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Supreme Court, U.S.
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Docket No. 85-1038

In The

Supreme Court of the United States

April Term, 1986

YONG BING-NAM, a/k/a YONG PIAN-NAM, a/k/a BING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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13 pp

QUESTIONS PRESENTED

1. Whether the Court should have enforced the cooperation plea agreement between Petitioner and the Government when a deal was made between the Petitioner and the Government and the Petitioner based his subsequent cooperation on that agreement?

2. Whether the prosecutor's rebuttal summation was so grossly improper as to require a reversal?

3. Whether error was committed in sustaining the prosecutor's objections to questions directed to an FBI agent concerning prior inconsistent statements of a key government witness?

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In The

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April Term, 1986

YONG BING-NAM, a/k/a YONG PIAN-NAM, a/k/a BING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari of the New York Court of Appeals for the Second Circuit

The petitioner, Yong Bing-Nam, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 17, 1986.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is reprinted in our Appendix.

JURISDICTION

Following a Jury trial, the petitioner was found guilty in the United States District Court for the Northern District of New York of Kidnapping, Conspiracy to Kidnap, Conspiracy to Transmit Ransom Demands in Interstate Commerce, Conspiracy to Receive Ransom Money, and Receipt of Such Monies (18 U.S.C. Sec. 1201(a)(1), 1201(c), 371, 1202).

On January 25, 1985, the petitioner was sentenced to a sentence of life imprisonment. Joint and several restitution with the petitioner's co-defendants of $150,000.00 was imposed. On January 17, 1986, the Court of Appeals for the Second Circuit affirmed the petitioner's conviction on all counts.

STATUTORY PROVISIONS INVOLVED

§1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32) [49 USC §1301(32)]); or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title [18 USCS §1116(b)], shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section or one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

§1202. Ransom Money

Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of section 1201 of this title [18 USCS §1201], knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(June 25, 1948, ch 645, §1, 62 Stat. 760.)

§371. Conspiracy to commit or to defraud United States

If two or more persons conspire to either commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 24, 1948, ch 645, §1, 62 Stat. 701.)

AMENDMENT VI

In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF FACTS

The facts relevant to the issues presented by this case, although complex, can be simplified. Accordingly, we have recruited only the most essential facts from the complicated record below.

The petitioner was arrested on the night of October 6, 1983, by a force of at least 22 law enforcement officers. He was arrested at the Kingston Tea Garden and was taken to the Kingston Police Barracks. Bing said nothing other than his name from the time he was arrested until the time he arrived at the State Police Barracks. He was taken to an office and seated in a straight upright chair where he remained and was questioned for the next twelve hours.

During the course of the questioning the petitioner was told that he was going to be charged with a conspiracy to kidnap, for which he could receive a sentence of life imprisonment. The petitioner said that he wanted to serve no time in jail, and was told that was not possible, but the agents would speak to an

Assistant U.S. Attorney to see what was possible. After communicating with the Assistant U.S. Attorney, the agents discussed the cooperation/plea offer with the petitioner with the full knowledge, authorization and consent of the U.S. Attorney's Office. Assistant U.S. Attorney Homer agreed to a reduced charge with a maximum ten year sentence if the petitioner could answer the questions on a list formulated by an FBI Special Agent. Petitioner was told that if he negotiated with the attorney's office and if he would truthfully and to his full knowledge answer these certain questions, he might be charged with an offense with a maximum ten year sentence and might actually serve three and a third years. After the FBI agents had received authorization from the U.S. Attorney's Office to make a deal, defendant agreed to the deal.

The petitioner subsequently provided information to the police in five of the seven categories of questions put to him. The two questions which he was not able to answer were questions to which he had told the police he might not be able to answer even prior to his interview. The interview took place on October 7, 1983 and was reinterviewed by the FBI on October 8, 1983.

The information provided by the petitioner to the FBI was summarized in a five-page, single spaced report.

REASONS FOR GRANTING WRIT

1. *The cooperation/plea agreement made between the petitioner and the government must be enforced.*

Petitioner argued in the Courts below that the government was bound by its representation that petitioner would receive a lighter sentence in exchange for his cooperation. The Court of Appeals for the Second Circuit held that it was unenforceable because petitioner never entered a guilty plea, citing *Mabry v. Johnson*, 104 S. Ct. 2543, 2546-47 (1984).

The issue presented by petitioner was not decided in *Mabry*. This Court held that defendant's acceptance of a prosecutor's proposed plea bargain did not create a constitutional right to have the bargain specifically enforced. However, in the instant case, the petitioner agreed to the deal proposed by the FBI, who were acting with the blessing of the United States Attorney's Office. It was not until *after* the petitioner had cooperated that the offer was withdrawn, and not before, as was the case in

Mabry. Fairness would preclude the prosecution's withdrawal of the plea proposal not only after the defendant accepted it but after he had cooperated to the best of his ability.

The conduct of the FBI shows that it did not deal fairly with the petitioner. The FBI posed a limited set of questions, obtained answers to those questions, and avoided its contractural obligation to petitioner by arguing that Bing should have said even more, even though he wasn't asked. This is improper, since considerations concerning a plea/cooperation agreement "presuppose fairness in securing an agreement between an accused and a prosecutor." (*Santobello v. New York*, 404 U.S. 257, 261 (1971)

The government is bound by the rules involving formal plea negotiations (*United States v. Grant*, 622 F. 2d 308, 313 (8th Circuit, 1980)). A cooperation agreement, like a plea agreement, is contractual in nature and subject to contract law standards and remedies. (See *United States v. Carrillo*, 709 F. 2d 35, 36 (9th Cir., 1983)).

The agreement should be enforced under settled notions of fundamental fairness.

2. *The prosecutor's rebuttal summation was grossly improper and constituted reversable error.*

The prosecutor, during his rebuttal summation, elected to discuss issues which he had not previously raised. The most egregious error was a discussion by the Assistant U.S. Attorney concerning $1,200.00 found on Bing's person at the time of his arrest. This did not direct itself to anything defense counsel said during his summation and did not rebut anything mentioned in summation. Despite a timely objection from counsel, this was grossly prejudicial and inflammatory.

The prosecutor should not be permitted to develop new arguments on rebuttal, but should be restricted to answering the arguments put forth by defense counsel (*Moore v. U.S.*, 344 F. 2d 558 (1965)). While the Trial Court has discretion as to the application of the rule governing the scope of rebuttal (*United States v. Lawson*, 483 F. 2d 535 (8th Cir., 1973)), that discretion is not so broad as to permit a trial judge to oversee a blow to the defendant's right to a fair trial caused by government's "sand-bagging". The government should not be allowed, as it was here, to conceal a salient point or feature of the case and then, if it is not argued by defendant, make a closing argument on that

feature. (*Misch v. CB Construction Company*, 394 SW 2d 98, 102 (1965)).

The issue is an important one involving the ethical obligation of a prosecutor upon which this Court has not specifically spoken.

3. *The Courts below erred in sustaining the prosecutor's objections to questions directed to an FBI agent concerning prior inconsistent statements of a key government witness.*

The District Court failed to allow petitioner to produce previous inconsistent statements made by chief government witness Eng to government agents. The Court below held that petitioner failed to meet the requirements of Fed. R. Evid. 613(b), so that there was no error, and even if there was, it was harmless error.

Petitioner submits that the Court below erred in so holding.

At the very least, a prior inconsistent statement of a witness is admissible for impeachment purposes. Fed. R. 801(d)(1)(A) also accords substantive use to prior inconsistent statements "if the declarant testifies at trial and is subject to cross-examination concerning the statement," provided that the statement is "inconsistent with his testimony and was given under oath and subject to the penalty of perjury at trial . . . "

Petitioner submits that the answers provided by FBI Agent Flynn were directly and irreconcilably inconsistent with the prosecution witness, William Eng, and defense counsel should have been permitted to explore the discrepancy.

The testimony of Eng was central to the government theory. These errors deprived petitioner of his right to effective confrontation in cross-examination of the witnesses against him and his right to present defensive evidence, all in violation of his Sixth Amendment rights.

The testimony should have been allowed.

CONCLUSION

For these various reasons, the Petition for Certiorari should be granted.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January, one thousand nine hundred and eighty-six.

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE GEORGE C. PRATT

Circuit Judge

HONORABLE CHARLES E. WYZANSKI, JR.*

District Judge

UNITED STATES
COURT OF APPEALS
FILED

JAN 17, 1986
ELAINE B. GOLDSMITH,
CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

ORDER
Docket Nos.
85-1038
85-1039
85-1040
85-1041

-against-

YONG BING-NAM, a/k/a YONG PIAN-NAM, a/k/a BING;
YONG BING-KEONG, a/k/a YONG PIAN-KEONG, a/k/a

TOMMY YOONG: YONG BING-GONG a/k/a
YONG PIAN-GONG a/k/a PETER: QUAH CHOON-PHENG,
a/k/a MING, a/k/a UNG HO CA,

Defendants-Appellants.

Appellants are co-conspirators who appeal their convictions in the United States District Court for the Northern District of New York (Miner, J.) arising from their participation in a kidnapping. After a jury trial, appellant Yong Bing-Keong (Keong) was found guilty of conspiracy to receive ransom money and actual receipt of such monies in violation of 18 U.S.C §§ 371, 1202: appellant Quah Choon-Pheng (Quah) was found guilty of conspiracy to kidnap and receipt of ransom money (18 US.C. § 1201(c), 371): appellant Yong Bing-Nam (Bing) was found guilty of kidnapping, conspiracy to kidnap, conspiracy to transmit ransom demands in interstate commerce, conspiracy to receive ransom money, and receipt of such monies (18 U.S.C. § 1201(a)(1), 1201(c), 371, 1202): and appellant Yong Bing-Gong (Gong) was found guilty of kidnapping, conspiracy to kidnap, conspiracy to transmit ransom demands in interstate commerce, transmission of ransom demands in interstate commerce, conspiracy to receive ransom money, and receipt of said monies (18 U.S.C. § 1201(a)(1), 1201(c), 371, 875(a), 1202).

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*United States District Judge for the District of Massachusetts, sitting by designation.

.A. v. BING-NAM
Docket Nos. 85-1038, 1039, 1040, 1041

The convictions result from the appellants' participation in the kidnapping of Yim Ling Eng. Without making specific reference to the role each of the appellants played in the plot, the appellants planned and executed the forcible abduction of Ms. Eng from her home in Westchester County, New York and transported her to New Jersey. A ransom was demanded from

her husband and delivered to Gong, who represented himself as an intermediary between the husband and the supposed kidnappers, but who was in reality one of the actual abductors. Efforts were made to launder the ransom money and one appellant fled the country. Ms. Eng's whereabouts are still unknown.

Each of the appellants challenge the sufficiency of the evidence supporting their respective convictions. After viewing the record in the light most favorable to the government, we find none of these challenges to have merit. *United States v. Pedroza*, 750 F.2d 187, 198 (2d Cir. 1984). Two of these claims require comment. Appellant Gong argues that the government had failed to show that Ms. Eng had actually been transported across state lines. We find that when the events that occurred in New York — many of the planning meetings and the actual kidnapping — are coupled with the events that took place in New Jersey — the purchase of the rental car, the placing of two ransom calls, and the statement that Ms. Eng's body could be found there — that a jury could reasonably conclude that Ms. Eng had been transported across state lines. Appellant Keong challenges his conviction arguing that there was no showing that he knew that the money that he possessed was ransom money. We note that the jury could infer, based upon Keong's possession of a large amount of the ransom monies, that he knew the source of those funds. *Cf. United States v. Johnpoll*, 239 F.2d 702, 711-12 (2d Cir.), *cert. denied*, 105 S. Ct. 571 (1984). When this evidence is combined with Keong's statement regarding the source of the funds we find that there was a reasonable basis for a jury to conclude that he knew that he possessed ransom money.

Several other claims require comment. Bing seeks enforcement of a cooperation agreement which he entered into with the government. The agreement is unenforceable because Bing never entered a guilty plea. *Mabry v. Johnson*, 104 S. Ct. 2543, 2546-47 (1984). Bing also challenges the failure of the district court to allow him to produce what he alleges were previous inconsistent statements made by Mr. Eng to government agents. Since the appellant failed to meet the requirements of *Fed. R. Evid. 613(b)* there was no error and even if there were, it was harmless error. Appellant Gong challenges the introduction of evidence concerning his efforts to extort additional ransom monies. The trial

court properly permitted the introduction of this evidence. Fed. R. Evid. 404(b); *see United States v. Silker*, 751 F.2d 477, 487-88 (2d Cir. 1984); *United States v. Levy*, 731 F.2d 997, 1002-04 (2d Cir. 1984).

For these reasons, the judgments of convictions are affirmed.

.A. v. BING-NAM
Docket Nos. 85-1038, 1039, 1040, 1041

s/s Richard J. Cardamone, U.S.C.J.

s/s George C. Pratt, U.S.C.J.

s/s Charles E. Wyzanski, Jr., U.S.D.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

YONG BING-NAM, AKA YONG PIAN-NAM, AKA BING,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly refused to enforce a cooperation agreement between petitioner and the government on the ground that petitioner did not comply with the terms of that agreement.

2. Whether the government's rebuttal summation was proper, where petitioner had argued in summation that only two pieces of evidence linked him to the crime and the prosecutor, in rebuttal, responded by pointing to other incriminating evidence against petitioner.

3. Whether the district court properly refused to allow petitioner to introduce extrinsic evidence of a prior inconsistent statement made by a government witness, where petitioner had not confronted the witness with the statement during that witness's testimony.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7-10) is reported at 788 F.2d 4 (Table). The opinion of the district court on various pretrial motions is reported at 594 F. Supp. 248.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1986. The petition for a writ of certiorari was filed on March 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201(a)(1) (Count 1), conspiracy to kidnap, in violation of 18 U.S.C.

1201(c) (Count 2), conspiracy to transmit ransom demands in interstate commerce, in violation of 18 U.S.C. 371 and 875(a) (Count 3), receipt of ransom money, in violation of 18 U.S.C. 1202 (Count 11), and conspiracy to receive ransom money, in violation of 18 U.S.C. 371 and 1202 (Count 10). Petitioner was sentenced to life imprisonment on Counts 1 and 2, to five years' imprisonment on Counts 3 and 10, and to ten years' imprisonment on Count 11, with all sentences to run concurrently. In addition, petitioner was ordered to pay restitution in the amount of $150,000. C.A. App. 21a, 23a, 27a-35a; Pet. App. 8.[1]

1. The evidence at trial established that in the fall of 1983, petitioner and his co-defendants planned and ultimately carried out the kidnapping of Yim Ling Eng from her residence in Hurley, New York, and transported her to New Jersey. The kidnappers demanded a ransom from Eng's husband, William Eng. William Eng complied with the request, and the ransom money was delivered to co-defendant Gong, who held himself out as an intermediary between William Eng and the abductors, but who in fact was one of the kidnappers. Yim Ling Eng was not released, and her whereabouts remain unknown. Pet. App. 8-9; 594 F. Supp. 248, 250 (1984).

On October 6, 1983, four days after the kidnapping, petitioner was arrested. Early the next morning, after being advised of his *Miranda* rights and executing a written

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[1]Petitioner was acquitted on three counts of transmission of ransom demands in interstate commerce. Co-defendants Yong Bing Gong, Quah Choon-Pheng and Yong Bing-Keong were convicted of various conspiracy, kidnapping, and ransom-related charges. Co-defendants Leong Hoong-Sien and Shirley Wong were acquitted on all counts. Co-defendant Chai Chee Keong pleaded guilty to receipt of ransom money, and the remaining charges against him were dismissed. C.A. App. 14a, 21a, 23a-24a; Pet. App. 9. Co-defendant Mak Gin was (and still remains) a fugitive (Pet. App. 9).

waiver of those rights, petitioner was questioned by state police officers and Federal Bureau of Investigation agents. Petitioner initially denied participating in or knowing anything about the kidnapping. When FBI Agent Wesley Wong advised petitioner of the charges against him, petitioner asked how long a sentence he could receive. Wong replied that the maximum sentence could be life imprisonment, but that the actual sentence would be determined by the court. Shortly thereafter, petitioner proposed a deal to the FBI agents whereby in exchange for immunity from prosecution, he would furnish information about the kidnapping. The agents then communicated petitioner's offer to their superiors and to representatives of the United States Attorney's Office. While waiting for a response from the United States Attorney's Office, FBI Agent Joseph Flynn discussed with petitioner a list of seven questions about the kidnapping that Flynn considered significant to the investigation. Petitioner stated that could answer five of the questions, but could not answer the two questions concerning the whereabouts of Eng or of those involved in the abduction. 594 F. Supp. at 250-251.

Subsequently, the United States Attorney's Office authorized an agreement with petitioner containing the following conditions: (1) petitioner would give truthful and complete answers to the seven questions identified by Flynn; (2) the government would limit the maximum sentence facing petitioner to ten years; (3) the agreement would be nullified if the government later determined that petitioner had given false or incomplete information; and (4) petitioner's duty to cooperate would be a continuing one. Petitioner accepted the agreement and proceeded to respond to the five questions that he had previously said he could answer. 594 F. Supp. at 252.

The following day, Flynn advised petitioner that he and other agents wanted to continue questioning petitioner about the kidnapping. Flynn reminded petitioner of his cooperation agreement and stated that there were inconsistencies and omissions in his previous answers. Flynn, Wong, and a local police investigator then questioned petitioner further. Petitioner, however, essentially reiterated what he had previously told the agents. 4/5/84 Tr. 825-832, 864-872. After that interview, petitioner gave no further information to the police (594 F. Supp. at 255-256). Accordingly, having determined that petitioner had breached the agreement by failing to cooperate fully with the investigation, the government refused to carry out its part of the bargain.

2. Petitioner subsequently moved to compel enforcement of the cooperation agreement. The district court, after conducting an evidentiary hearing on the motion, ruled that petitioner had breached the agreement and therefore could not enforce it against the government. Specifically, the court found (594 F. Supp. at 255):

> [T]he Court is persuaded that defendant's response to questioning breached fundamental terms of the agreement, viz., that his answers be truthful and complete, and that his obligation to cooperate be a continuing one. Contrary to defendant's suggestion, the Government did not seek to impose additional conditions upon defendant but rather sought only to obtain the full cooperation for which it had bargained. That cooperation was not forthcoming and its absence has been identified by the Government in exhaustive detail.

The court then specified numerous examples of errors and omissions in what petitioner had told the agents (*ibid.*), and concluded that "[petitioner's] misstatements, omissions,

and continued failure to cooperate have deprived the Government of its bargained-for benefit" (*id.* at 256).[2]

After being tried and convicted, petitioner appealed his conviction to the court of appeals. He claimed—as he does in this Court—that (1) the government should be compelled to perform under the cooperation agreement; (2) the prosecutor's rebuttal summation was improper; and (3) the district court erred in refusing to admit extrinsic evidence of a prior inconsistent statement made by a government witness (Pet. 5-6). The court of appeals rejected all three contentions.[3] As to the cooperation agreement, the court ruled that the agreement was unenforceable because no guilty plea had been entered. With respect to the prior inconsistent statement, the court ruled that extrinsic evidence of that statement was properly excluded, because petitioner had failed to lay a proper foundation for offering the statement, as required by Fed. R. Evid. 613(b). The court also found that even if there was error with respect to the statement, the error was harmless. The court rejected without comment petitioner's challenge to the prosecutor's rebuttal argument. Pet. 9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other

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[2]As it turned out, the government was prohibited from using at trial even the incomplete and misleading statements given by petitioner. The district court suppressed those statements on the ground that the delay between petitioner's arrest and arraignment (during which time the statements were made) was impermissibly long (594 F. Supp. at 253-254). Petitioner does not allege that any evidence at trial was derived from, or tainted by, the statements he made to the police.

[3]The court also rejected petitioner's claim, which is not raised in this Court, that the evidence was insufficient to support the jury's verdict (Pet. App. 9).

court of appeals. Review by this Court is therefore not warranted.

1. Petitioner's principal contention (Pet. 4-5) is that the district court erred by refusing to enforce the cooperation agreement between petitioner and the government. Petitioner claims that he honored his part of the agreement because he "cooperated to the best of his ability" by answering the "limited set of questions" posed by the FBI (Pet. 5). That assertion, however, is contrary to the findings of both courts below. As the district court found (594 F. Supp. at 255-256),[4] petitioner gave false and incomplete answers to the FBI agents' questions. Furthermore, after the initial interviews, he failed to provide any further information whatsoever. Since petitioner failed to perform his part of the agreement, he cannot compel performance by the government. See, *e.g., United States* v. *Leach*, 749 F.2d 592, 598 (10th Cir. 1984) (defendant could not enforce cooperation agreement where he had failed to comply with terms of that agreement); *United States* v. *Brooks*, 670 F.2d 625, 627 (5th Cir. 1982) (government not bound by cooperation agreement where defendant did not fulfill promise to assist in arrest of another drug dealer); *United States* v. *Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) ("It is clear that a defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement."), cert. denied, 451 U.S. 1018 (1981); *United States* v. *Donahey*, 529 F.2d 831, 832 (5th Cir.) (government not bound by plea agreement where

[4]Petitioner does not address the district court's findings that he breached the terms of the agreement. We submit that the district court's findings are correct and certainly are not clearly erroneous.

defendant, having agreed to give testimony and cooperate in prosecution of another person, gave "evasive and misleading answers"), cert. denied, 429 U.S. 828 (1976).[5]

2. Relying on *Moore* v. *United States*, 344 F.2d 558 (D.C. Cir. 1965), petitioner claims (Pet. 5-6) that the prosecutor, during his rebuttal summation, made improper arguments by raising points that were not discussed during petitioner's summation. In particular, petitioner points to the prosecutor's reference in rebuttal to $1200 of the ransom money that was found on petitioner at the time of his arrest (Pet. 5). Petitioner's contention is without merit.

In *Moore*, the court of appeals set forth the unexceptionable propositon that "[a]s a general rule, Government counsel should not be allowed to develop new arguments on rebuttal, but should be restricted to answering the arguments put forth by defense counsel." 344 F.2d at 560.[6] Contrary to petitioner's contention (Pet. 5-6), the prosecutor in this case complied fully with the teachings of *Moore*.

The testimony at trial showed that on October 5, 1983, William Eng gave petitioner $150,000 in $100 bills for delivery to co-defendant Gong, and that the money was delivered the following morning. When petitioner was arrested that evening, he had 12 of the bills from the ransom money

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[5]Furthermore, under the facts of this case, the court of appeals correctly ruled that the agreement was unenforceable because petitioner had not entered a plea of guilty prior to the government's withdrawal of the offer (Pet. App. 9, citing *Mabry* v. *Johnson*, 467 U.S. 504 (1984)). Moreover, petitioner suffered no conceivable harm from the alleged breach of the agreement by the government, since the statements given by him were not introduced against him at trial.

[6]The court in *Moore* held that despite the prosecutor's improper argument in rebuttal that defendant had failed to call a certain witness, there was no prejudice to the defendant and therefore no basis for reversal. 344 F.2d at 560.

that the victim's husband had paid the previous day. 7 Tr. 105-108; 9 Tr. 81-82; 14 Tr. 130-133.[7] In its closing argument the government argued that the money and other evidence demonstrated petitioner's guilt (29 Tr. 91-93).

In his closing argument, petitioner's counsel contended that only two pieces of evidence linked him to the kidnapping of Yim Ling Eng: the rental of the vehicle used in the kidnapping and his suggestion to Eng's husband that he enlist co-defendant Gong's assistance (30 Tr. 6-7, 32, 36, 43). Petitioner also argued that he had been charged in the case only because he was Gong's brother (30 Tr. 16). Petitioner did not mention the $1200 that had been found on him at the time of his arrest.

In rebuttal, the government specifically referred to petitioner's assertion in closing argument that only two pieces of evidence linked him to the crime (31 Tr. 25). He noted that petitioner was wrong, and that significant additional evidence linked him to the offenses, including the seizure of $1200 from petitioner at the time of his arrest (31 Tr. 25-28).[8]

The prosecutor's rebuttal was clearly a direct response to the arguments made by petitioner and was, therefore, entirely proper. Having asserted that only two pieces of evidence linked him to the crime, petitioner invited the prosecutor to discuss the other evidence against him. Far

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[7]The serial numbers of the 12 bills found on petitioner (GX 51) matched the serial numbers of the ransom bills delivered by William Eng to petitioner (GX 49).

[8]The district court overruled petitioner's objection to the prosecutor's argument (31 Tr. 27). Petitioner concedes that the trial judge "has broad discretion as to the application of the rule governing the scope of rebuttal" (Pet. 5). See, *e.g.*, *United States* v. *Lawson*, 483 F.2d 535, 539 (8th Cir. 1973), cert. denied, 414 U.S. 1133 (1974).

from having made an improper argument, therefore, the prosecutor would have been derelict in his duty had he failed to refute petitioner's erroneous closing argument.[9]

3. Finally, petitioner contends (Pet. 6) that the district court improperly refused to permit him to introduce testimony from Agent Flynn concerning certain statements allegedly made by government witness William Eng to Flynn on October 5, 1983.[10] According to petitioner, the statements were admissible because they were inconsistent with Eng's in-court testimony. This claim is without merit; as the court of appeals correctly found (Pet. App. 9), petitioner failed to comply with the foundational requirements of Fed. R. Evid. 613(b), and he was therefore not allowed to introduce extrinsic evidence of prior inconsistent statements.

The witness in question, William Eng, testified on direct examination that, after discovering that his wife had been kidnapped, he contacted petitioner. According to Eng, petitioner suggested that they contact co-defendant Gong in New York City for assistance. Eng testified that he was surprised at that remark, because he had thought Gong was in California. Eng was certain that petitioner was the first to

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[9]Even if the challenged portion of the rebuttal argument had been somehow improper, the error would not have resulted in any prejudice to petitioner, and reversal is therefore unwarranted. See *Moore*, 344 F.2d at 560; see generally *Darden* v. *Wainwright*, No. 85-5319 (June 23, 1986); *United States* v. *Young*, No. 83-469 (Feb. 20, 1985). The prosecutor's argument in question was a brief—and accurate—discussion of the evidence; it was neither unfair nor inflammatory.

[10]Petitioner does not identify these statements in his petition, except to indicate (Pet. 6) that they were made to Agent Flynn. In his brief to the court of appeals (Appellant's Br. 17), petitioner indicated that he was referring to statements made by Eng to Flynn on October 5, 1983; again, however, he never specified the precise statements to which he was referring.

suggest enlisting the aid of Gong. 7 Tr. 79-89. On cross-examination, petitioner sought to demonstrate that it was Eng, not petitioner, who had first mentioned Gong's name. That would have supported petitioner's claim that he was an innocent intermediary rather than a co-conspirator. Petitioner questioned Eng at length about his testimony on direct examination and about his purportedly inconsistent grand jury testimony. 8 Tr. 8-78.[11] With the exception of one brief reference that is not relevant here (8 Tr. 65), the only reference to Eng's October 5, 1983, interview with Agent Flynn occurred on recross examination, when petitioner merely asked Eng if he had told the truth to Flynn on October 5, 1983 (8 Tr. 112).

During the defense case, both petitioner and Gong offered into evidence portions of Eng's grand jury testimony that they claimed were inconsistent with his trial testimony (C.A. App. 536a, 544a). Petitioner also sought to elicit testimony from Flynn concerning his interview with Eng on October 5, 1983 (19 Tr. 33-36). After repeated objections were sustained to Flynn's testimony about that interview, petitioner, at the invitation of the court, made a proffer as to the evidence he sought to elicit from Flynn concerning the October 5 interview. Petitioner indicated that Eng's prior statements contradicted his in-court testimony that petitioner had first suggested contacting Gong and that Eng did not know that Gong was in New York. Petitioner did not, however, point to the specific portions of Eng's prior statements that allegedly supported his claim. 19 Tr. 31-39. After listening to the proffer, the district court sustained the government's objections to petitioner's questions about that interview (19 Tr. 39-40).

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[11]In particular, Eng had testified in the grand jury that he had mentioned Gong to petitioner because he knew that Gong worked at a gambling house in New York and knew many people (C.A. App. 536a).

Rule 613(b) of the Federal Rules of Evidence provides that extrinsic evidence of a prior inconsistent statement by a witness is not admissible "unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon." The courts of appeals have repeatedly upheld the exclusion of alleged prior inconsistent statements because of a defendant's failure to meet the foundational requirements of Rule 613(b). See, *e.g.*, *United States* v. *Elliott*, 771 F.2d 1046, 1051 (7th Cir. 1985); *United States* v. *Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982).[12]

The court of appeals correctly held (Pet. App. 9) that petitioner was not entitled to introduce extrinsic evidence of a prior inconsistent statement because he failed to comply with the requirements of Rule 613(b). Specifically, petitioner did not confront William Eng with the purported inconsistent statement so that Eng could explain or deny it. Instead, he simply asked Eng if he had told the truth to Flynn on October 5, 1983 (8 Tr. 112). Petitioner was therefore not entitled to elicit from Flynn the prior inconsistent statement that was allegedly made by Eng on October 5, 1983.[13]

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[12]The rationale of the rule is one of fairness to the witness and to the party calling him. As one leading treatise has explained (3 D. Louisell & C. Mueller, *Federal Evidence* § 358, at 561 (1979)):

> If the credibility of the witness is to be called into question, he should have some chance to defend himself; and if the direct testimony of a witness is to be undermined, the calling party should have an opportunity to show that any vacillation by the witness has an innocent explanation or does not truly raise doubts as to the evidence which the witness has given.

[13]Fed. R. Evid. 613(b) is subject to a narrow exception in cases where exclusion would be contrary to the "interests of justice." The court of appeals' ruling (Pet. App. 9) that petitioner had failed to comply with Rule 613(b) is an implicit determination that the "interests of justice" did not require admission of the extrinsic evidence in this case. Petitioner gives no reason why that exception should apply in this case.

In any event, as the court of appeals correctly noted (Pet. App. 9), even if the district court's evidentiary ruling was incorrect, the error was harmless. Petitioner cross-examined William Eng at great length (7 Tr. 163-175; 8 Tr. 5-78, 111-112), and probed various inconsistent statements that he made, including statements he made during his grand jury testimony. The evidence at issue therefore would not have added significantly to the force of the impeachment of Eng. In light of the strong evidence against petitioner in the several-week trial, the alleged error therefore could not possibly have affected the verdict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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